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Time to Sever the Dead Hand: Fisk University and the Cost of the Cy Pres Doctrine

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TIME TO SEVER THE DEAD HAND: FISK UNIVERSITY AND THE COST OF THE *CY PRES* DOCTRINE[♦]

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In 1949, painter Georgia O’Keeffe donated 101 valuable paintings and photographs to Fisk University,¹ a prominent and historically important African-American university in Nashville, Tennessee. The donated art was part of a larger collection amassed by her late husband, Alfred Stieglitz, a prominent artist and collector.² Stieglitz’s will gave O’Keeffe a life estate in his collection,³ which included works by Picasso, Cezanne, Renoir, Toulouse-Lautrec, O’Keeffe, Demuth, Hartley, Dove and Walkowitz.⁴ Stieglitz’s will also gave O’Keeffe the discretion to distribute the collection to nonprofit organizations of her choosing for the purpose of ensuring public access to the paintings to promote the study of art.⁵ At O’Keeffe’s death, any pieces in his

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¹ See *In re Fisk Univ.*, No. NF05-2994-III, 2007 WL 4913166 (Tenn. Ch. June 12, 2007).

² See *Georgia O’Keeffe Found. v. Fisk Univ.*, 312 S.W.3d 1, 4 (Tenn. Ct. App. 2009).

³ See *In re Fisk Univ.*, No. 05-2994-III, 2008 WL 5347750 (Tenn. Ch. Feb. 8, 2008).

⁴ *The Carl Van Vechten Gallery*, FISK U., http://www2.fisk.edu/gallery/galleries_van_vechten.html (last visited Sept. 28, 2012).

⁵ See *Georgia O’Keeffe Found.*, 312 S.W.3d at 5. Stieglitz’s estate included about nine hundred works of art, and his will named Georgia O’Keeffe executrix of the estate. At the time of Stieglitz’s death, a New York statute prohibited a testator from giving to charity testamentary gifts that consisted of more than half of the estate if a spouse or child survived the testator. Stieglitz was survived by a disabled daughter, which raised a question as to whether Stieglitz’s will violated that statute. As part of a settlement agreement, O’Keeffe exercised her power under Stieglitz’ will. The Collection represented less than fifty percent of the value of the estate. See Alan L. Feld, *Symposium: The Role of Fiduciary Law and Trust in the Twenty-First Century*, 91 B.U. L. REV. 873, 882 (2011).

collection that she had not donated were to be distributed to nonprofit organizations “under such arrangements as will assure to the public . . . access thereto to promote the study of art.”⁶

O’Keeffe divided Stieglitz’s collection among six institutions: the Metropolitan Museum of Art, the Philadelphia Museum of Art, the National Gallery of Art in Washington, the Art Institute of Chicago, the Library of Congress, and Fisk University.⁷ The donation to Fisk, a small university with no museum experience, was unusual. In choosing Fisk, O’Keeffe was making a strong social statement⁸—the South was racially segregated at that time, and O’Keeffe wanted to ensure that the art would be displayed in a place that welcomed both black and white members of the public.

But although she wanted to benefit Fisk, O’Keeffe—like many donors before and after—could not bring herself to relinquish complete control to the donee. Instead, she imposed a series of restrictions designed to ensure both the proper display and care of the art work and the creation of a perpetual memorial to Alfred Stieglitz.⁹ To achieve those ends, O’Keeffe stipulated in a series of letters to Fisk’s President that the donated art must always be displayed together as one collection titled the Alfred Stieglitz Collection (“the Collection”), and that Fisk could never sell any piece in the Collection.¹⁰ She also required that the Collection be housed in as safe a building as possible and kept under surveillance at all times when the room was not locked.¹¹ O’Keeffe severely limited the University’s ability to loan the artwork, directed that no other art work could be shown in the same room as the Collection without her consent, prohibited the removal or change of any mounting or matting of photographs, and required that the walls of the room where the Collection was displayed be painted white or some other very light color chosen by O’Keeffe.¹² Several years later, O’Keeffe donated four paintings from her own collection, including one of her own paintings, *Radiator Building—Night, New York* (“*Radiator Building*”), to Fisk, with the stipulation that the paintings be added to the Collection.¹³

O’Keeffe appears to have given little, if any, consideration to the impact the perpetual restrictions might have decades down the line. Like many donors who make restricted gifts, she failed to imagine how life might change in the years following her death. For example, she

⁶ *Georgia O’Keeffe Found.*, 312 S.W.3d at 5.

⁷ *See id.* at 6.

⁸ *See* Feld, *supra* note 5, at 883.

⁹ *See Georgia O’Keeffe Found.*, 312 S.W.3d at 6.

¹⁰ *See id.*

¹¹ *See id.*

¹² *See id.*

¹³ *See id.* at 7.

does not appear to have contemplated that Fisk might cease to exist; that the University might one day lack funds to maintain the Collection; that the matting on the photographs might deteriorate; or that she might not be around to approve the paint color of the walls. She gave no guidance as to how Fisk should respond to changed circumstances or as to which of her objectives—benefitting Fisk, creating a perpetual memorial in honor of Stieglitz, keeping the Collection together, prohibiting sale of the Collection, and ensuring the Collection remained in the South—should be given priority in the event that changed circumstances should cause them to come into conflict.¹⁴

What happened sixty years later was predictable—changed circumstances, unforeseen by O’Keeffe, rendered it impossible for Fisk to comply with all of the restrictions. Fisk was on the brink of insolvency, and had to choose whether to close the University and relinquish the Collection, or find a way to replenish its endowment and properly care for the Collection.¹⁵ Fisk decided to sell two paintings—including *Radiator Building*.¹⁶ The Tennessee Attorney General approved of the sale, subject to certain conditions, and Fisk, seeking court approval, filed an action for a declaratory judgment.¹⁷ The O’Keeffe Museum of Santa Fe, New Mexico (“the Museum”), and later, the Attorney General of Tennessee, intervened to enforce the sale prohibition.¹⁸ After six years of litigation and two appeals, a chancery court granted Fisk permission to sell a fifty percent interest in the Collection to the Crystal Bridges Museum in Arkansas for thirty million dollars.¹⁹ The deal allows Fisk to exhibit the Collection six months of every year.²⁰ The payment of thirty million dollars will ensure both that Fisk will survive and that it will be able to afford to properly care for and exhibit the artwork.²¹

Why did resolution of this conflict require six years of litigation and the expenditure of enormous amounts of charitable and public dollars? The blame lies with the law itself: the centuries-old doctrine of *cy pres*, which requires courts to determine how the donor would have responded to the changed circumstances,²² combined with the law’s lack

¹⁴ See *Georgia O’Keeffe Found.*, 312 S.W.3d 1.

¹⁵ See *id.* at 4. Fisk never intended to sell pieces of the collection to private collectors, but, mindful of O’Keeffe’s intent, sought buyers who could ensure that the art remained accessible to the public. It first approached the Frist Center for the Visual Arts, located in Nashville, but the museum had no interest in purchasing “ugly art.” Jennifer Brooks, *Fisk University Sought Frist Center’s Help with Art*, TENNESSEAN, Aug. 14, 2010, available at 2010 WLNR 16265230.

¹⁶ See *Georgia O’Keeffe Found.*, 312 S.W.3d at 1.

¹⁷ See *id.* at 4.

¹⁸ See *In re Fisk Univ.*, No. NF05-2994-III, 2007 WL 4913166 (Tenn. Ch. June 12, 2007).

¹⁹ See *In re Fisk Univ.*, No. M2010-02615-COA-R3-CV, 2011 WL 5966893 (Tenn. Ct. App. Nov. 29, 2011).

²⁰ See *Georgia O’Keeffe Found.*, 312 S.W.3d at 5.

²¹ *Id.*

²² See *In re Fisk Univ.*, 2007 WL 4913166.

of clarity about who has standing to speak for the donor,²³ practically guarantee that years of litigation will ensue when a charity finds itself unable to comply with a gift restriction. In the *Fisk* case, the law's fuzziness allowed the Museum—an unrelated third party—to make a grab for the Collection under the guise of effectuating donor's intent. The fact-specific *cy pres* standard also enabled the Tennessee Attorney General to make it extraordinarily difficult for Fisk to craft a solution involving entities located outside the state of Tennessee.²⁴ Although the court ultimately approved Fisk's contract with the Crystal Bridges Museum, that approval came at an extraordinarily high cost.

The doctrine of *cy pres* holds that donor's intent is of paramount value. Courts must therefore prioritize effectuation of intent over other concerns, such as donees' present needs or the inefficient use of charitable dollars.²⁵ This preoccupation with perpetual enforcement of donor intent is justified as necessary to encourage charitable bequests and protect donors' property rights.²⁶ Yet what the law giveth, it taketh away: the law's commitment to donor intent stops short at granting to donors standing to enforce the restrictions they create.²⁷ Instead, enforcement power is given to the attorneys general of each state.²⁸

The *Fisk* litigation is just one of several recent epic battles over restricted charitable gifts and changed circumstances,²⁹ but it is

²³ See generally Evelyn Brody, *From the Dead Hand to the Living Dead: The Conundrum of Charitable-Donor Standing*, 41 GA. L. REV. 1186 (2007).

²⁴ See Jonathan Marx, *State Wants Say on Fisk Art*, TENNESSEAN, April 18, 2007, at 1B, available at 2007 WLNR 27536583.

²⁵ See Rob Atkinson, *Reforming Cy Pres Reform*, 44 HASTINGS L.J. 1112, 1115 (1993); see also *In re Fisk Univ.*, 2007 WL 4913166.

²⁶ See Feld, *supra* note 5, at 891; see also Susan N. Gary, *The Problems with Donor Intent: Interpretation, Enforcement, and Doing the Right Thing*, 85 CHI.-KENT L. REV. 977, 1002 (2010).

²⁷ See Brody, *supra* note 23, at 1187.

²⁸ See *id.*

²⁹ In recent years, there have been several high-profile *cy pres* cases that lasted years and consumed millions of dollars of charitable assets. In 2002, three children of Charles and Marie Robertson, who donated \$35 million to Princeton University to train graduate students in its Woodrow Wilson School of Public and International Affairs, sued Princeton claiming that Princeton "betrayed" the trust that the Robertsons had placed in it. They alleged that the University had spent approximately two hundred million dollars in ways that the donor had not originally intended, and that the University had failed to graduate sufficient numbers of students who entered government and foreign-service jobs after graduation. See Maria Newman, *Princeton University is Sued over Control of Foundation*, N.Y. TIMES, Jul. 18, 2002, at 5. Princeton claimed that the Robertson heirs were distorting the history of the foundation and that the heirs "cited materials selectively and out of context to forward their efforts to gain control of the funds that Marie and Charles Robertson committed to the support of the graduate program of the Woodrow Wilson School." *Princeton Answers Allegations of Misuse of Robertson Gift*, PHILANTHROPY NEWS DIG. (Mar. 15, 2006), <http://foundationcenter.org/pnd/news/story.jhtml?id=135500009>. See also *Robertson Lawsuit Overview*, <https://www.princeton.edu/robertson/about> (last updated Dec. 16, 2008) (setting forth Princeton's argument that it had complied with donor's directives). Six years and over eighty million dollars in legal fees later, the parties settled the case. See JAMES J. FISHMAN & STEVEN SCHWARTZ, *NONPROFIT ORGANIZATIONS: CASES AND MATERIALS* 234 (4th ed. 2010).

In another example, millions of dollars were spent over more than a decade as various groups of students, neighbors and other individuals sued to stop the Barnes Foundation from moving the Museum to downtown Philadelphia in violation of Dr. Barnes' express directives.

important because it neatly illustrates the problems that the law creates and highlights the need for legal reform. After elaborating on this point, I examine the Uniform Trust Code (“UTC”), which changes *cy pres* law in significant ways. I show how application of certain UTC provisions to the *Fisk* case would have reduced the length of the litigation and the corresponding waste of charitable assets, to some degree. I then argue that further reforms are necessary. I suggest that perhaps the time has come to consider limiting the duration of restrictions on charitable gifts. To offset any chilling effect that such a time limit might have on charitable giving, we might allow donors and their heirs to enforce restrictions during the period of enforceability.

I. THE STANDING PROBLEM

Historically, and in most states today, a donor of a restricted gift has no standing to enforce the restrictions unless the gift instrument reserves to the settlor a right of reversion for breach of a condition.³⁰ Because reserving a right may render the gift “incomplete,” and thus not tax-deductible, donors generally do not create express reversions.³¹ The law’s refusal to recognize donor standing comes from trust law, and “derives from a view of the transaction as a property interest—and donated property is simply no longer the settlor’s. Rather, for enforcement, trust law looks forward: beneficiaries (who have equitable title) have the power to bring suit for breach of fiduciary duty on the part of the trustee (who has legal title).”³² State attorneys general traditionally have been the only parties with standing to enforce restricted gifts.

But attorneys general face constraints that limit their ability to

See Brody, *supra* note 23, at 1245.

³⁰ *See, e.g.,* Carl J. Herzog Found., Inc., v. Univ. of Bridgeport, 699 A.2d 995, 997 (Conn. 1997) (explaining the common-law rule). Courts have also, from time to time, granted standing to third parties who have a “special interest” in the litigation. Key factors courts consider in determining whether to grant special interest standing include: 1) the extraordinary nature of the acts complained of and the remedy sought by the plaintiff; 2) whether there was fraud or misconduct; 3) the effectiveness or availability of the State Attorney General; and 4) the nature of the benefitted class and its relationship to the charity. *See* Mary Grace Blasko, Curt S. Crossley & David Lloyd, *Standing to Sue in the Charitable Sector*, 28 U.S.F. L. REV. 37, 61–78 (1993). *See also* RESTATEMENT (SECOND) OF TRUSTS § 391 (1959) (“A suit can be maintained for the enforcement of a charitable trust by the Attorney General or other public officer, or by a co-trustee, or by a person who has a special interest in the enforcement of the charitable trust, but not by persons who have no special interest or by the settlors or his heirs, personal representatives or next of kin.”); Brody, *supra* note 23, at 1191.

³¹ According to the Internal Revenue Code, a donor may not take a deduction for a charitable contribution unless the taxpayer permanently surrenders “dominion and control” over the property. *See* I.R.C. § 170(a) (2006); Treas. Reg. § 1.170A-1(c). If there is a possibility—not “so remote as to be negligible”—that a restricted gift to charity might fail because the donee is unable to comply with the conditions, the donor has not surrendered control and the IRS will not allow the donor to deduct the gift. *See* I.R.C. § 2055 (2006); Treas. Reg. § 20.2055-2(b).

³² Brody, *supra* note 23, at 1197.

effectively monitor charities' compliance with gift restrictions.³³ Most offices have no charities bureau with a separate budget; it is a fair question whether scarce public funds should be devoted to holding charities accountable for gift restrictions as opposed to, say, fighting crime or enforcing state environmental regulations. Even when attorneys general are inclined to address problems in the nonprofit sector, they are unlikely to focus on whether particular charities are honoring the terms of restricted gifts.³⁴ The issues that come to their attention tend to involve more egregious breaches of fiduciary duties, such as self-dealing or grossly incompetent management.³⁵ And even when attorneys general do intervene to enforce restrictions, their political interests may conflict with their duty to uphold donative intent.³⁶

As a result, in recent years some sympathetic courts have granted standing to donors³⁷ or the heirs of donors' estates³⁸ to enable them to enforce specific restrictions on charitable gifts.

In these lawsuits, donors are not necessarily seeking return of their gifts—they merely want a continuing say in how their charitable donations are managed and spent.³⁹ But the *cy pres* doctrine itself gives donors or their estates a second basis on which to make a standing argument—and this theory enables them to argue for the return of the

³³ See *Oberly v. Kirby*, 592 A.2d 445, 468 (Del. 1991).

³⁴ See *L.B. Research & Educ. Found. v. UCLA Found.*, 29 Cal. Rptr. 3d 710, 717 (Cal. Ct. App. 2005) (“The Attorney General may not be in a position to become aware of wrongful conduct or to be sufficiently familiar with the situation to appreciate its impact, and the various responsibilities of his office may also tend to make it burdensome for him to institute legal actions except in situations of serious public detriment.”).

³⁵ See Evelyn Brody, *Whose Public? Parochialism and Paternalism in State Charity Law Enforcement*, 79 IND. L.J. 937 (2004); see also Susan N. Gary, *Regulating the Management of Charities: Trust Law, Corporate Law, and Tax Law*, 21 U. HAW. L. REV. 593, 623 (1999) (noting that even in those states where the Attorney General's office has an active enforcement division, most enforcement efforts occur in response to complaints by whistleblowers or the press).

³⁶ See Jonathan Klick & Robert H. Sitkoff, *Agency Costs, Charitable Trusts, and Corporate Control: Evidence from Hershey's Kiss-Off*, 108 COLUM. L. REV. 749 (2008) (describing how the Pennsylvania Attorney General's intervention in the proposed Hershey Trust Sale destroyed approximately \$2.7 billion in shareholder wealth); Brody, *supra* note 35; MARION R. FREMONT-SMITH, GOVERNING NONPROFIT ORGANIZATIONS: FEDERAL AND STATE LAW AND REGULATION 327–28, 444 (2004); Mark Sidel, *The Struggle for Hershey: Community Accountability and the Law in Modern American Philanthropy*, 65 U. PITT. L. REV. 1 (2003).

³⁷ See *UCLA Found.*, 29 Cal. Rptr. 3d 710.

³⁸ See *Howard v. Adm'rs of the Tulane Educ. Fund*, 986 So. 2d 47 (La. 2008) (holding that “would-be heir or legatee” has standing to enforce a restricted gift); *Smithers v. St. Luke's-Roosevelt Hosp. Ctr.*, 281 A.D.2d 127, 723 N.Y.S.2d 426 (App. Div. 2001) (holding that widow of donor who donated ten million dollars to hospital to establish alcohol rehabilitation center had standing to enforce intent of donor where two successive attorneys general filed certificates of discontinuance).

³⁹ See, e.g., *Smithers v. St. Luke's-Roosevelt Hosp. Ctr.*, 281 A.D.2d 127, 723 N.Y.S.2d 426 (App. Div. 2001). For articles exploring the issue of donor standing, see Iris J. Goodwin, *Donor Standing to Enforce Charitable Gifts: Civil Society vs. Donor Empowerment*, 58 VAND. L. REV. 1093 (2005), and Robert A. Katz, *Can Principal-Agent Models Help Explain Charitable Gifts and Organizations?*, 2000 WIS. L. REV. 1; see also UNIF. TRUST CODE § 405(c) (2005) (providing that donors have standing to enforce charitable trusts).

donated property. *Cy pres* doctrine dictates that a failed gift that cannot be reformed because the donor lacked a general charitable intent reverts to the donor or the donor's estate.⁴⁰ In either case, adjudicating whether or not a donor or her residuary legatees have standing can add years to a *cy pres* proceeding.⁴¹

In the *Fisk* case, the lack of clarity surrounding the issue of donor standing enabled the Georgia O'Keeffe Museum to argue that it had standing to enjoin Fisk's breach of the sale restriction. Fisk first raised the issue that the Museum lacked standing in objection to the Museum's motion to intervene.⁴² The Chancellor reserved decision on the standing question and granted the Museum's motion. Fisk raised the issue again, moving for summary judgment to dismiss the Museum from the case. In response, the Museum argued simply that it had standing, on behalf of O'Keeffe, to enforce the promises Fisk made to her.⁴³ The Chancellor ruled in favor of the Museum,⁴⁴ holding that O'Keeffe was acting in her capacity as a life tenant when she made the gift to Fisk, and that the Museum, which was the residuary beneficiary of O'Keeffe's estate, had standing as her "successor in interest."⁴⁵

Shortly after, the Museum and Fisk negotiated a settlement agreement. Fisk agreed to sell O'Keeffe's *Radiator Building* painting to the Museum for \$7.5 million in exchange for the Museum's promise not to object to Fisk's efforts to sell the second painting.⁴⁶ Note the irony; the Museum's ability to sue Fisk to enjoin it from selling any painting in the Collection gave it the leverage it needed to purchase one of the Collection's most valuable paintings at a deep discount.⁴⁷

⁴⁰ See, e.g., *Georgia O'Keeffe Found. v. Fisk Univ.*, 312 S.W.3d 1 (Tenn. Ct. App. 2009) (rejecting petitioner's claim that the donor lacked general charitable intent and so the failed gift should revert to the donor's estate); see also *Estate of Crawshaw*, 249 Kan. 388, 819 P.2d 613 (1991); *Estate of Coleman*, 584 P.2d 1255 (Kan. App. 1978); *Nelson v. Kring*, 225 Kan. 499, 592 P.2d 438 (1979); *Newman*, *supra* note 29.

⁴¹ See, e.g., *Howard*, 986 So. 2d 47 (litigating standing issue for more than two years).

⁴² See Fisk's Response in Opposition to the Georgia O'Keeffe Foundation's Expedited Motion to Intervene, to Reset Trial, and for a Scheduling Order, *In re Fisk Univ.*, No.05-2994-III, 2006 TN App. Ct. Motions LEXIS 3, 2005 TN Ch. Ct. Motions 941870 (Jan. 5, 2006).

⁴³ See Fisk's Memorandum of Law in Support of its Motion for Summary Judgment to Dismiss the Museum and Its Counter-Claims, *In re Fisk University*, No. 05-2994-III, 2006 Tenn. Ct. App. Motions LEXIS 4, 2005 Tenn. Ch. Motions 891719 (Aug. 25, 2006).

⁴⁴ The court either ruled from the bench or issued an unpublished opinion. This account is taken from *Georgia O'Keeffe Found.*, 312 S.W.3d 1.

⁴⁵ See *Georgia O'Keeffe Found.*, 312 S.W.3d 1. There is support for the Chancery Court's view that the estate of a donor has standing to enforce restrictions imposed by the donor as part of a charitable gift. See *Smithers v. St. Luke's-Roosevelt Hosp. Ctr.*, 281 A.D.2d 127, 723 N.Y.S.2d 426 (App. Div. 2001) (holding that widow of donor who donated ten million dollars to hospital to establish alcohol rehabilitation center had standing to enforce intent of donor to ensure donated funds were used for specified purposes); *In re Application of Syracuse Univ.*, 3 N.Y.2d 665, 670 (N.Y. 1958) (holding that upon frustration of the conditions, the gift reverted to the donor's heirs regardless of whether the donor had expressly retained a reversion).

⁴⁶ Ultimately, the Museum also agreed to lend the painting to Fisk for four months every four years and to provide a reproduction of *Radiator Building* to Fisk for display.

⁴⁷ As a condition for approving the sale, the Tennessee Attorney General required Fisk to solicit donations for a thirty-day period to see if it could raise enough money to keep the painting. Fisk

On September 10, 2007, however, the Chancellor rejected the proposed settlement on the ground that it was inconsistent with O'Keeffe's intent.⁴⁸ The Chancellor also encouraged Fisk to consider other *cy pres* proposals, including one submitted by the Crystal Bridges Museum of Arkansas. On September 28, 2007, Fisk filed a petition to amend its complaint to seek court approval of the Crystal Bridges proposal on *cy pres* grounds.

At this point, the Museum changed tactics. Instead of continuing to seek an injunction to enforce the sale prohibition⁴⁹ or, better yet, bowing out of the case,⁵⁰ it filed an answer to Fisk's amended complaint, seeking to obtain the entire Collection. Now that a settlement was off the table, the Museum had little to gain by seeking to enjoin Fisk from selling two paintings. Instead, it now argued that O'Keeffe lacked the general charitable intent necessary to justify the application of the *cy pres* doctrine, that Fisk could no longer effectuate O'Keeffe's specific intent, and that the Museum, as O'Keeffe's heirs, had an implied reversion in the entire Collection.⁵¹ Once again Fisk, now joined by the Attorney General, challenged the Museum's standing in a motion for summary judgment.⁵² On December 21, 2007, the Chancellor again held in the Museum's favor, agreeing that it held an implied reversion in O'Keeffe's estate.⁵³

The matter dragged on in the Chancery Court for another year and a half. Fisk sought court approval of the Crystal Bridges proposal, but the Museum filed a motion for summary judgment, arguing that the court could not grant relief on *cy pres* grounds because O'Keeffe lacked general charitable intent. In February 2008, the court granted the

received offers of twenty to twenty-five million dollars. The Museum reacted by announcing that it would "go back to court" if Fisk even considered the offers. According to the Museum's president:

This has never been a question of bidding for the painting. It's not being sold. A lawsuit it being settled. . . . This settlement makes it possible for Fisk to receive a substantial amount of money . . . and an important painting ends up in what is the logical home: the only museum in the world devoted to her work.

Jonathan Marx, *Fisk Can't Peddle Art, Museum Warns*, TENNESSEAN, Mar. 20, 2007, at 1B.

⁴⁸ See *Georgia O'Keeffe Found.*, 312 S.W.3d 1.

⁴⁹ See *In re Fisk Univ.*, No. NF05-2994-III, 2007 WL 4913166 (Tenn. Ch. June 12, 2007).

⁵⁰ Oddly, on September 12, 2007, the New York Times reported that the Museum had decided to drop its claims, and quotes the Museum's president, who explained that bowing out of the case was "the right thing to do." See Theo Emery, *Fight Over an O'Keeffe Ends*, N.Y. TIMES (Sept. 12, 2007), <http://www.nytimes.com/2007/09/12/us/12museum.html>. It is not clear whether this report is erroneous, or whether the Museum planned to drop out and then changed its mind, deciding to go after the entire Collection.

⁵¹ See *In re Fisk Univ.*, No. 05-2994-III, 2008 WL 5361639 (Tenn. Ch. Mar. 6, 2008) (stating that "[t]he claims in this lawsuit have been narrowed to who shall have custody and control of the Alfred Stieglitz Collection" and that "the one claim left [is] the counterclaim for reversion filed by the [Museum]").

⁵² On November 15, 2007, Fisk filed another motion for summary judgment, demanding that the Museum be dismissed for lack of standing. On December 21, 2007, the court denied Fisk's motion. See *In re Fisk Univ.*, No. 05-2994-III, 2007 WL 5877148 (Tenn. Ch. Dec. 21, 2007).

⁵³ See *id.*

Museum's motion and disapproved the Crystal Bridges proposal.⁵⁴ Shortly thereafter the case went to trial on the Museum's counterclaim for a reversion. On March 6, 2008, the Chancery Court issued its decision, finding that Fisk, by its own admission, was unable to care for the Collection and thus had breached one of O'Keeffe's conditions. But in a surprising move, the Chancellor determined that because Fisk had recently received \$1.6 million in grants and donations, "the circumstances [did] not yet justify removing the Collection from Fisk."⁵⁵ Accordingly, the court imposed a mandatory continuing injunction preventing Fisk from selling the Collection; directing Fisk to remove the Collection from storage and display it; and providing that noncompliance would result in a finding of contempt and forfeiture of the Collection.⁵⁶

Fisk appealed in July 2009, arguing that 1) the Museum lacked standing, and 2) the chancery court erred when it held that O'Keeffe lacked general charitable intent. The appellate court ruled in Fisk's favor on both counts. The court dismissed the Museum from the case, explaining that O'Keeffe had held only a life estate and a special, presently exercisable power of appointment in Stieglitz's collection and that therefore any interest she had in the Collection terminated at her death.⁵⁷ The court remanded with instructions to determine whether compliance with O'Keeffe's conditions was impossible or impracticable, and if so, to fashion relief that most closely comported with O'Keeffe's intent.⁵⁸

Given that O'Keeffe had only a life estate in the Collection, the appellate court's ruling is sound. But in fairness to the chancery court judge, New York standing law⁵⁹ is quite murky: in one prominent case, a court allowed a donor's heir to sue to enforce the donor's restrictions;⁶⁰ in another, the court held that a donor's estate had an implied reversion in the donated property that conferred standing on the donor's estate.⁶¹ These cases created fertile ground for the Museum's arguments and the judge's confusion. The result was an enormous waste of charitable dollars.

⁵⁴ See *In re Fisk Univ.*, No. 05-2994-III, 2008 WL 5347750 (Tenn. Ch. Feb. 8, 2008).

⁵⁵ *In re Fisk Univ.*, 2008 WL 5361639.

⁵⁶ See *id.*

⁵⁷ See *Georgia O'Keeffe Found. v. Fisk Univ.*, 312 S.W.3d 1 (Tenn. Ct. App. 2009).

⁵⁸ See *id.*

⁵⁹ The Chancellor determined that New York law applied to the case because Stieglitz's will was probated in New York Surrogate's Court. See *In re Fisk Univ.*, No. NF05-2994-III, 2007 WL 4913166 (Tenn. Ch. June 12, 2007).

⁶⁰ See *Smithers v. St. Luke's-Roosevelt Hosp. Ctr.*, 281 A.D.2d 127, 723 N.Y.S.2d 426 (App. Div. 2001) (holding that widow of donor who donated ten million dollars to hospital to establish alcohol rehabilitation center had standing to enforce intent of donor).

⁶¹ See *Howard v. Adm'rs of the Tulane Educ. Fund*, 986 So. 2d 47, 50 (La. 2008) (holding that "would-be heir or legatee" has standing to enforce a restricted gift).

II. *CY PRES*: THE PROBLEM WITH TRYING TO EFFECTUATE INTENT

The confusion surrounding standing doctrine is not the only problem with *cy pres* proceedings. *Cy pres* doctrine itself generates enormous expense for little payoff.

When compliance with the terms of a charitable trust becomes impossible or impracticable, the court may reform the trust to best enable it to carry out the donor's general charitable intent. If, upon review, the court finds that the donor manifested *only* "specific charitable intent," then "the law presumes that the donor would prefer the gift to fail rather than to be modified contrary to the specific charitable purpose."⁶² Although jurisdictions differ over whether a restricted gift is held in trust by the donee,⁶³ courts nevertheless apply trust law's *cy pres* doctrine when a donee of a restricted gift not in trust seeks relief from a condition on grounds of changed circumstances.⁶⁴

At its core, then, a *cy pres* proceeding is about defining the course of action that the donor would have directed had she anticipated those circumstances. When, as in the *Fisk* case, the problem involves multiple restrictions that have come into conflict with one another, the court must determine which conditions or restrictions have priority over others. Because the donor is not available for consultation, the court must make an informed guess based on indirect evidence. This infinitely malleable doctrine enables parties to advance their self-interest under the guise of effectuating donor's intent. The result is a process that often takes years to resolve and dissipates significant amounts of charitable assets and taxpayer dollars.

Again, the *Fisk* case is illustrative. Each of the three parties—the Museum, the Tennessee Attorney General, and Fisk University—painted entirely different pictures about how O'Keeffe would have responded to changed circumstances. Over the years, Fisk applied for *cy pres* relief twice: first when it sought relief from the sale prohibition to enable it to find a purchaser for two paintings donated by O'Keeffe,⁶⁵ and second, after the Chancellor denied the first petition, to request court approval of the sale of a fifty-percent interest in the Collection to Crystal Bridges, a motion that the Chancellor also denied.⁶⁶ The Museum and the Attorney General objected to both proposals.⁶⁷

⁶² *Id.*

⁶³ Compare RESTATEMENT (THIRD) OF TRUSTS § 28 cmt. a (2003) (stating that an unrestricted gift to a charity does not create a trust while a gift made for a specific purpose does), with N.Y. NOT-FOR-PROFIT CORP. LAW § 513 (providing that a donee of a restricted gift is not a trustee).

⁶⁴ See, e.g., *St. Joseph's Hosp. v. Bennett*, 22 N.E.2d 305 (N.Y. 1939) (holding that a charitable corporation must abide by gift restrictions unless it obtains *cy pres* relief from the court).

⁶⁵ See *In re Fisk Univ.*, 2007 WL 4913166.

⁶⁶ See *In re Fisk Univ.*, No. 05-2994-III, 2008 WL 5347750 (Tenn. Ch. Feb. 8, 2008).

⁶⁷ See *In re Fisk Univ.*, No. M2010-02615-COA-R3-CV, 2011 WL 5966893 (Tenn. Ct. App. Nov. 29, 2011). The Attorney General of Tennessee appealed the court's approval of the settlement agreement between Fisk and Crystal Bridges, "contending that the trial court exceeded

First consider the position taken by the Georgia O'Keeffe Museum. The gist of the Museum's argument was that O'Keeffe would have preferred that the Museum take possession of the Collection if Fisk failed to comply with any one of the numerous conditions that she imposed.⁶⁸ In other words, the Museum argued that O'Keeffe lacked general charitable intent.⁶⁹ In support of its position, the Museum cited various letters written by O'Keeffe to Fisk's president expressing concern that Fisk was not up to the task of caring properly for the Collection, and offering to place the Collection elsewhere if Fisk lacked the resources to act as custodian.⁷⁰

Fisk, on the other hand, argued that O'Keeffe's choice of Fisk as one of six charitable recipients of Stieglitz's estate was integral to the gift.⁷¹ O'Keeffe had important reasons for wanting the Collection displayed there, and would have agreed to modify the restrictions if failure to do so would have caused Fisk to close its doors.⁷²

To the Tennessee Attorney General, O'Keeffe had one overriding goal—to benefit all of the citizens of Tennessee by displaying the Collection in Nashville. In fact, when Fisk first approached the Attorney General in 2005 for permission to sell two paintings, the Attorney General (at that time, Paul Summers) agreed with little fanfare to allow Fisk to violate O'Keeffe's clear prohibition, on two conditions: that Fisk use its best efforts to sell the paintings to Tennessee residents, and that Fisk obtain from any buyer a promise to allow public viewings of the painting.⁷³ Once the Museum (based in New Mexico) intervened in the case, the Attorney General (now Robert Cooper) made an unsuccessful attempt to intervene as well. In February 2007, when Fisk and the Museum announced that they had agreed to a settlement which allowed the Museum to purchase O'Keeffe's *Radiator Building* for seven million dollars in exchange for the Museum's promise not to oppose Fisk's quest to sell the second painting, the Attorney General conditioned his approval on Fisk taking thirty days to try to obtain sufficient donations to keep the painting. Fisk received no donations during that thirty-day period, but did receive several offers to purchase *Radiator Building*, including one offer of twenty million and another of twenty-five million dollars.⁷⁴ After that, the Attorney General

the scope of remand and that the court erred in determining that the agreement with the Crystal Bridges Museum most closely reflects the donor's intent." *Id.*

⁶⁸ See *Georgia O'Keeffe Found. v. Fisk Univ.*, 312 S.W.3d 1, 8 (Tenn. Ct. App. 2009).

⁶⁹ See *id.* at 4.

⁷⁰ See *id.* at 6.

⁷¹ See *id.* at 17–18.

⁷² See *id.*

⁷³ Phil Sweetland, *Arts, Briefly; Fisk University to Sell O'Keeffe Painting*, N.Y. TIMES, (Dec. 8, 2005), <http://query.nytimes.com/gst/fullpage.html?res=9A04E2DA1031F93BA35751C1A9639C8B63>.

⁷⁴ See Jonathan Marx, *Fisk Can't Peddle Art, Museum Warns*, TENNESSEAN, Mar. 20, 2007, at 1B.

announced that he could no longer support the Museum-Fisk settlement agreement because the purchase price of seven million dollars was too low.⁷⁵

Not that the Attorney General was interested in allowing Fisk to accept one of the twenty-million-dollar offers from out-of-state buyers. Instead, in April 2007 the Attorney General again moved to intervene in the case because “[t]here [was] no party currently to this proceeding representing the interests of the people of Tennessee, who, as recognized by the General Assembly, [were] the true charitable beneficiaries of Miss O’Keeffe’s charitable gift.”⁷⁶ After the motion to intervene was granted, the Attorney General objected to Fisk’s first *cy pres* proposal on the ground that modification of the restrictions should be limited “to changing the location of the Collection from the University to another place in Nashville to obtain financial relief for the University in maintaining the Collection.”⁷⁷

In the Chancellor’s view, one thing was quite clear—O’Keeffe viewed Fisk as a custodian of the Collection and had no intention to allow the University to benefit financially from its ownership of the artwork.⁷⁸ From this, the Chancellor determined that O’Keeffe lacked general charitable intent, and that therefore the *cy pres* doctrine could not resolve the problems caused by changed circumstances. The appellate court reversed the trial court’s determination, emphasizing that: 1) Stieglitz’s will authorized O’Keeffe to make broad distributions to nonprofits (and only to nonprofits); 2) O’Keeffe in fact made charitable donations to seven major nonprofit institutions, thereby adopting Stieglitz’s charitable intent; and 3) O’Keeffe retained no express right to retake possession upon breach of a condition.⁷⁹

The appellate court might have also relied on another fact to support its determination that O’Keeffe would have preferred a *cy pres* remedy over a reversion to the Museum: O’Keeffe never designated the Museum (or the Foundation that preceded it) as the residuary beneficiary of her estate. To explain, the O’Keeffe Foundation, the precursor to the Museum, was formed as part of a settlement of a will contest over O’Keeffe’s estate. When O’Keeffe died in 1986, her will left the bulk of her estate to John Hamilton, her longtime companion,⁸⁰

⁷⁵ See Jonathan Marx, *Fisk Can Get Better Deal, Art Pros Say*, TENNESSEAN, Apr. 6, 2007, at 1A. After the Chancellor rejected the proposed settlement, the Attorney General declared, “It was a good deal for the museum. It was a bad deal financially for Fisk and a bad deal artistically for Fisk and a bad deal culturally for the community.” *O’Keeffe Art Sale Halted*, CAPITAL TIMES, Apr. 9, 2007, at C2.

⁷⁶ Jonathan Marx, *State Wants Say On Fisk Art*, TENNESSEAN, Apr. 18, 2007, at 1B.

⁷⁷ *In re Fisk Univ.*, No. NF05-2994-III, 2007 WL 4913166 (Tenn. Ch. June 12, 2007).

⁷⁸ See *In re Fisk Univ.*, No. 05-2994-III, 2008 WL 5347750 (Tenn. Ch. Feb. 8, 2008).

⁷⁹ See *Georgia O’Keeffe Found. v. Fisk Univ.*, 312 S.W.3d 1, 17–19 (Tenn. Ct. App. 2009).

⁸⁰ See *id.* at 7.

and her relatives filed a will contest.⁸¹ The settlement agreement resolving the contest created the Georgia O’Keeffe Foundation, which was designated as the residuary beneficiary of O’Keeffe’s estate.⁸² In March 2006, the Foundation dissolved and transferred its assets to the O’Keeffe Museum, which was substituted for the Foundation in the *Fisk* litigation.⁸³

Not only did O’Keeffe have no part in creating the O’Keeffe Foundation; she never even knew of its existence. If she had had her way, Hamilton would have been her residuary beneficiary. This fact further undermines the Museum’s argument that O’Keeffe would have preferred to see the gift to Fisk fail and the property revert to the Museum.

One might think that the appellate division’s determinations in 2009 that the Museum lacked standing and that O’Keeffe manifested general charitable intent, along with the Tennessee Supreme Court’s denial of certification,⁸⁴ would have marked the beginning of the end of the litigation. Although the appellate court remanded with instructions to determine whether Fisk’s compliance with the conditions was impossible or impracticable, no party had ever contested that point. Accordingly, the court’s only significant remaining task was to fashion relief that comported as nearly as possible with O’Keeffe’s specific intent.

The Attorney General, however, changed tactics again. After hailing the opinion as establishing that “neither [Fisk] nor [the Georgia O’Keeffe Museum] should be allowed to move the [C]ollection,” he did a complete about-face, announcing that he would now oppose Fisk’s application for *cy pres* relief on the ground that Fisk’s compliance with O’Keeffe’s conditions was no longer impossible or impracticable.⁸⁵ As evidence, he cited the fact that the Southern Association of Colleges and Schools had recently reaccredited Fisk, which it presumably would not have done if Fisk was struggling financially. As the Attorney General explained to reporters, “the university can no longer argue that the sale of the Collection is necessary to its financial survival.”⁸⁶

The Attorney General’s opposition prolonged the litigation for more than two additional years. When the Chancellor determined on remand that Fisk could not comply with the restrictions,⁸⁷ the Attorney

⁸¹ *See id.*

⁸² *See id.*

⁸³ *See id.* at 8.

⁸⁴ *See Georgia O’Keeffe Found. (Museum) v. Fisk Univ.*, M008-00723-SC-R11-CV, 2010 Tenn. LEXIS 204 (Tenn. Feb. 22, 2010).

⁸⁵ Jennifer Brooks, *Attorney General Says Fisk Has No Right to Sell O’Keeffe Art*, TENNESSEAN, Feb. 23, 2010.

⁸⁶ *Id.*

⁸⁷ *See In re Fisk Univ.*, No. M2010-02615-COA-R3CV, 2011 Tenn. App. LEXIS 641, at *4 (Nov. 29, 2011); *see also* Brief of Intervenor-Appellee Attorney General & Reporter at 27, *In re*

General continued to oppose Fisk's efforts to sell an interest in the Collection to Crystal Bridges. As a result, the Chancellor rejected the Crystal Bridges offer because, in her view, it deviated too far from O'Keeffe's intent.⁸⁸ She then gave the Attorney General a deadline for submitting alternative proposals.⁸⁹ He ultimately submitted two, both of which involved removing the Collection from Fisk's custody (for no consideration) and placing it in the care of local institutions.⁹⁰ Crystal Bridges then submitted a modified proposal. At the next hearing, the Attorney General argued vigorously against the modified Crystal Bridges proposal, changing tactics once again. He now argued (in the hearing as well as in the subsequent appeal) that O'Keeffe's paramount objective was to prohibit the sale of the Collection. He announced to the press that he had a duty to enforce the no-sale provision because to do otherwise "could discourage future charitable giving in this state."⁹¹ This was a complete reversal of the position his office took in 2006 when it approved the sale of Radiator Building.⁹² Clearly, the Attorney General was willing to take any position to ensure that the Collection remained in Nashville.

Although the Chancellor finally approved the modified Crystal Bridges proposal, she ordered Fisk to keep twenty million of the thirty-million-dollar sale price in an endowment for the sole purpose of taking care of the Collection.⁹³ Fisk appealed this requirement, and the Attorney General appealed the Chancellor's approval of the Crystal Bridges proposal. Finally, in 2011, the Tennessee Court of Appeals settled the issue once and for all by affirming the Chancery Court's approval of the Crystal Bridges proposal but reversing its directive that Fisk must use twenty million dollars of the proceeds for maintaining the Collection.⁹⁴

The Attorney General's position—that the donor cared most about benefitting the local citizenry—is one that Attorneys Generals frequently take in *cy pres* litigation.⁹⁵ But, as Evelyn Brody has

Fisk Univ., No. M2010-02615-COA-R3-CV, 2011 WL 2006328 (Tenn. Ct. App. May 9, 2011).

⁸⁸ *In re Fisk Univ.*, 2011 Tenn. App. LEXIS 641, at *4.

⁸⁹ *Id.*

⁹⁰ The first proposal would have created a public and private partnership between the State of Tennessee, the Frist Center for the Visual Arts, and the Metropolitan Government of Nashville and Davidson County. The partnership would have taken custody of the Collection until Fisk had the financial ability to resume its role as custodian. Pursuant to the second proposal, Fisk alumna Carol Creswell-Betsch would establish an endowment fund to "benefit, in perpetuity, the display and care of the Alfred Stieglitz Collection at the Van Vechten Gallery at Fisk University." *In re Fisk Univ.*, 2011 Tenn. App. LEXIS 641, at *6. Fisk would have received no money for relinquishing the Collection. The Chancellor rejected both proposals. *See id.* at *4–7.

⁹¹ Jennifer Brooks, *AG Unveils Plan to Keep Fisk Art in Nashville*, TENNESSEAN, Sept. 10, 2010 at 1A.

⁹² *Id.* at *23.

⁹³ *See id.* at 19.

⁹⁴ *See In re Fisk Univ.*, 2011 Tenn. App. LEXIS 641.

⁹⁵ *See* Klick & Sitkoff, *supra* note 36, at 758 ("[E]ven if the Attorney General does intervene in

emphasized, charitable assets do not necessarily “belong” to the state in which the charity is located;⁹⁶ an attorney general’s proper objective is to enforce charitable intent and fiduciary duties rather than to represent the state’s pecuniary interests. Unfortunately, the *cy pres* doctrine is sufficiently malleable that an attorney general can always invoke donor intent to argue for a remedy or solution that would benefit the people of his or her state.

III. RECENT REFORMS: THE UNIFORM TRUST CODE

The Uniform Trust Code (“UTC”) has taken some significant steps to modify the legal regime to reduce litigation over changed circumstances. Although the UTC, by its terms, applies only to charitable trusts, it will no doubt influence how courts apply the *cy pres* doctrine to restricted gifts. The UTC makes a few radical changes to charitable trust doctrine: section 413, which codifies the *cy pres* doctrine, creates a conclusive presumption that the donor possessed a general charitable intent and broadens the grounds for applying *cy pres*.⁹⁷ Specifically, it provides that “if compliance with the terms of a trust becomes illegal, impossible, impracticable or wasteful,” the trust shall not fail, and the court shall apply the *cy pres* doctrine to fashion relief that comports as closely as possible with the testator’s intent. Section 405(c) states simply that the donor of a charitable trust has standing to enforce its terms.⁹⁸ Taken together, the UTC has the

the administration of a charitable trust, the intervention might be designed to promote the Attorney General’s political interests rather than the trust’s charitable purpose. Indeed, the Attorney General’s intervention in this instance preserved agency costs within the Trust on the order of roughly \$850 million.”); Evelyn Brody & John Tyler, *Respecting Foundation and Charity Autonomy: How Public Is Private Philanthropy?*, 85 CHI.-KENT L. REV. 571, 573 n. 1 (2010) (stating that in 2008, Republican Governor Matt Blunt of Missouri tried to compel a private Missouri foundation to use 80 percent of its grant budget to support underfunded state health care programs because the charitable assets “belong to Missouri taxpayers.”).

⁹⁶ Brody & Tyler, *supra* note 95, at 580.

⁹⁷ UTC section 413 in its entirety reads:

(a) Except as otherwise provided in subsection (b), if a particular charitable purpose becomes unlawful, impracticable, impossible to achieve, or wasteful:

(1) the trust does not fail, in whole or in part;

(2) the trust property *does not revert* to the settlor or the settlor’s successors in interest; and

(3) the court may apply *cy pres* to modify or terminate the trust by directing that the trust property be applied or distributed, in whole or in part, in a *manner consistent with the settlor’s charitable purposes*.

(b) A provision in the terms of a charitable trust that would result in distribution of the trust property to a noncharitable beneficiary prevails over the power of the court under subsection (a) to apply *cy pres* to modify or terminate the trust only if, when the provision takes effect:

(1) the trust property is to revert to the settlor and the settlor is still living; or

(2) fewer than 21 years have elapsed since the date of the trust’s creation.

UNIF. TRUST CODE § 413 (2005) (emphasis added).

⁹⁸ UTC section 405(c) provides: “The settlor of a charitable trust, among others, may maintain a proceeding to enforce the trust.” The comments to that section state: “Contrary to Restatement (Second) of Trusts § 391 (1959), subsection (c) grants a settlor standing to maintain an action to enforce a charitable trust. The grant of standing to the settlor does not negate the right of the state

potential to alter the landscape of *cy pres* litigation—especially if courts are willing to extend its scope to restricted gifts not in trust.

Consider how the *Fisk* litigation might have unfolded if the UTC had been enacted in Tennessee when Fisk sought to sell the two paintings and the Chancery Court had determined that the provisions should apply to restricted gifts. First, the Museum could not have argued that it had an implied reversion in the paintings. Its only avenue for establishing standing would have been to argue that it had succeeded to O’Keefe’s right to standing under section 405(c). Because section 405(c) does not expressly state whether donor standing extends to a donor’s estate, that issue might have provoked some litigation. But even if the Museum had succeeded in convincing the court to extend to it donor standing as O’Keefe’s residuary beneficiary, it would have given rise only to an action to enforce the prohibition on sale by injunction. As in the actual case, the Museum would have had some leverage to convince Fisk to settle. However, once the Chancery Court rejected the proposed settlement, there would have been no reason for the Museum to continue with the case because it would have had no ground to argue that the Collection should revert to it. The Museum would have likely pulled out of the litigation in 2007, two years before the appellate division dismissed its petition for lack of standing.

The Attorney General, however, would still have had the power to object to any *cy pres* proposal that involved a party from a state other than Tennessee. And given his desire to keep the property in Tennessee, it might have taken a year or two to fashion an appropriate *cy pres* remedy. The changes to the UTC, however positive, would not entirely prevent fruitless and expensive litigation over the intent of a donor who made a gift sixty years earlier.

IV. A PROPOSAL FOR FURTHER REFORM

The reforms implemented in the UTC are good ones. I advocate extending their reach to apply to restricted gifts. But further reform is necessary. The time has come to consider a legal rule limiting the duration of restrictions on charitable donations. A time limitation—of, say, forty years—would enable donors to direct the use of charitable assets for a reasonable period but greatly reduce litigation over changed circumstances and the accompanying waste of charitable and public dollars. The law should clearly grant standing to donors or their heirs to enforce the restrictions during the period of enforceability, and the *cy pres* doctrine would apply if the charity argued that changed circumstances rendered compliance impossible or impracticable. But

attorney general or persons with special interests to enforce either the trust or their interests.” *Id.* § 405 & cmts.

after that point, a charity that finds itself unable to comply with restrictions should be able to change course as necessary, bound only by its fiduciary duties of care, loyalty and obedience to mission—duties that an attorney general will still have the power to enforce. Because charities need to compete for charitable dollars, reputational concerns will pressure charities to depart from donor intent only in those instances where deviation is necessary to enable the charity to accomplish its broader mission.

There are two possible objections to this idea, neither of which is terribly persuasive. First, some might argue (and indeed, many people have advanced this argument in conversation) that the ability to restrict the use of property in perpetuity is one stick in the bundle of rights and deserves protection for that reason alone. But to suggest that property ownership carries with it the unfettered right to control property after death is simply wrong as a descriptive matter. The law is replete with examples of limits that courts and legislatures have placed on this “right.” To consider some obvious examples: first, the Internal Revenue Service imposes gift and estate taxes on estates exceeding a specified value. This quite clearly frustrates some property owners’ ability to control the disposition of a percentage of their assets after death. Second, most states constrain married property owners from disinherit their spouses, no matter how badly they may want to.⁹⁹ Third, many states place limits on the duration of private trusts, to avoid the problems that stem from a donor’s poor foresight.¹⁰⁰ Fourth, many courts decline to enforce testamentary provisions requiring the destruction of property.¹⁰¹ Fifth, courts will not enforce total restrictions on alienation.¹⁰² I could go on, but the point is clear. The question is not *whether* the state may place restrictions on a property owner’s right to direct the disposition of assets after death, but *when* are those limitations justified. In my view, limiting the duration of restrictions could be justified as necessary to curb the enormous waste of charitable and public dollars that occur under the current unworkable legal regime.

The second objection one might raise is that perpetual enforcement of restricted gifts is necessary to encourage charitable giving. My

⁹⁹ See, e.g., ALASKA STAT. § 13.12.203 (2008); COLO. REV. STAT. § 15-11-202 (2008); CONN. GEN. STAT. § 45a-436(a) (2004); HAW. REV. STAT. § 560:2-203 (2004); KAN. STAT. ANN. § 59-6a203 (2003); MASS. GEN. LAWS ch. 191 § 15 (1992); MINN. STAT. § 524.2-203 (2002); MONT. CODE ANN. § 72-2-222 (2007); N.Y. EST. POWERS & TRUSTS §5-1.1-A (McKinney 2012); N.D. CENT. CODE § 30.1-05-02 (1996 & Supp. 2003); S.C. CODE ANN. § 62-2-201 (2009); S.D. CODIFIED LAWS § 29A-2-203 (1997); UTAH CODE ANN. § 75-2-203 (2009); W. VA. CODE ANN. § 42-3-1 (2004).

¹⁰⁰ See, e.g., ARK. CODE ANN. § 18-3-101 (2009); CAL. PROB. CODE §21200 (West 2011); CONN. GEN. STAT. §45a-491 (2004); NY EST. POWERS & TRUST §9-1.1 (McKinney 2012).

¹⁰¹ RESTATEMENT (SECOND) OF TRUSTS § 124 cmt. g, illus. 5 (1959).

¹⁰² See, e.g., *White v. Brown*, 559 S.W.2d 938 (Tenn. 1977).

instinct is that limiting the duration of restrictions would have no significant chilling effect. For one thing, many philanthropists are more motivated by altruism than by ego. For those who need a push, the tax code, with its charitable income and estate tax deductions, probably does more to incentivize charitable giving than the promise of donor control. Moreover, those donors who truly care about deadhand control may be reassured by the promise that they—or their heirs, if they should die before the restrictions expire—will have standing to enforce the restrictions during the period of enforceability. This increase in control might act as a counterweight to any disincentive that time limits on enforceability might create.

I am not the first scholar to argue that *cy pres* doctrine should be reformed.¹⁰³ But up to now, reform—to the extent it has occurred at all—has proceeded at a glacial pace. The result is that exorbitant amounts of charitable and public dollars are wasted each year as heirs, attorneys general, and third parties to go war with charities over the meaning of restrictions and how donors might have responded to changed circumstances. As the *Fisk* litigation demonstrates, the law's murkiness will ensure that this waste continues. The time has come to reassess whether allowing unlimited control is worth the price.

¹⁰³ See, e.g., John K. Eason, *Motive, Duty, and the Management of Restricted Charitable Gifts*, 45 WAKE FOREST L. REV. 123 (2010); Rob Atkinson, *The Low Road to Cy Pres Reform: Principled Practice to Remove Dead Hand Control of Charitable Assets*, 58 CASE W. RES. L. REV. 97 (2007); Iris J. Goodwin, *Ask Not What Your Charity Can Do for You: Robertson v. Princeton Provides Liberal-Democratic Insights into the Dilemma of Cy Pres Reform*, 51 ARIZ. L. REV. 75, 102 (2009); Robert A. Katz, *Let Charitable Directors Direct: Why Trust Law Should Not Curb Board Discretion over a Charitable Corporation's Mission and Unrestricted Assets*, 80 CHI.-KENT L. REV. 689, 701 (2005); Rob Atkinson, *Reforming Cy Pres Reform*, 44 HASTINGS L.J. 1112 (1993).